

Magnesium Corporation, d.b.a. Renco, and its workers' compensation insurance carrier, National Union Fire Insurance (referred to jointly as "Renco"), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Sims' preliminary determination that W. C. is permanently and totally disabled for purposes of compensation under the Utah Workers' Compensation Act ("the Act"; Title 35, Chapter 1, U.C.A., 1994 Supp.).<sup>1</sup> Renco also asks the Appeals Board to review Administrative Law Judge Eblen's determination that Mr. C. cannot be reemployed or rehabilitated and is, therefore, entitled to a final award of permanent total disability compensation.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

### **BACKGROUND AND ISSUES PRESENTED**

Mr. C. seeks permanent total disability compensation for a back injury caused by a work-related accident at Renco on September 8, 1994. Judge Sims conducted the first evidentiary hearing on Mr. C.'s claim and, on May 11, 1998, issued an interim finding that Mr. C. was permanently and totally disabled, subject to further proceedings to determine if he could be reemployed or rehabilitated.

Judge Sims then retired from the Commission. Judge Switzer conducted additional proceedings regarding Mr. C.'s claim, but Judge Switzer then left the Commission. Ultimately, responsibility for completing the adjudication of Mr. C.'s case devolved to Judge Eblen. After further evidentiary proceedings, Judge Eblen concluded that Renco had failed to establish Mr. C. could be reemployed or rehabilitated. Consequently, Judge Eblen issued a final order on September 28, 2001, awarding permanent total disability compensation to Mr. C..

Renco now asks the Appeals Board to review Judge Sims' interim findings and Judge Eblen's final order. In its motion for review, Renco raises the following issues: 1) Whether Mr. C.'s work at Renco was the "legal cause" of the injuries for which he now seeks compensation; 2) Whether Mr. C. meets the standards of the Act for a preliminary determination of permanent total disability; 3) Whether the ALJ properly applied the "reemployment/rehabilitation" provisions found in §67 of the Act; and 4) The constitutionality of the Act's provisions governing permanent total disability compensation.

### **FINDINGS OF FACT**

The Appeals Board affirms and adopts the findings of fact set forth in Judge Sims and Judge Eblen's decisions to the extent such findings are not inconsistent with the Appeals Board's own findings, set forth below.

Mr. C. was born in 1950. In grade school, he was diagnosed with dyslexia. He suffered from

learning difficulties throughout his school career, finally leaving school during the 11<sup>th</sup> grade with limited ability to read or write. Mr. C. then received training as a welder through vocational courses and in the military. On discharge from service, he found employment as a welder. Renco hired him in that capacity during 1984.

While working at Renco on August 10, 1989, Mr. C. fell down some stairs and injured his back. He underwent decompressive laminectomy surgery and was left with a 23% whole person impairment from the work injury plus a 2% whole person impairment from preexisting facet joint hypertrophy and stenosis (narrowing) of the disc space. Mr. C. returned to Renco under light duty restrictions and continued to work there until a second accident on September 8, 1994.

On the morning of September 8, 1994, Mr. C. was part of a crew relining refractory cells with refractory brick. Mr. C.'s specific assignment was to cut each brick to the size required for installation. He performed this task by lifting individual bricks from a pallet, then carrying each brick several feet to a saw where he would then make the necessary cuts. Each of the refractory bricks weighed approximately 35 pounds. During the first three hours of his shift, Mr. C. lifted, carried and cut approximately 60 bricks and experienced some back pain. Then, as he lifted yet another brick, he felt a sharp, additional pain in his back.

Mr. C. was diagnosed with recurrent disc herniation at the L4/5 level of his spine, coupled with the same facet joint hypertrophy and disc space stenosis that had been found to exist prior to his 1989 injury. He underwent another surgery. As a result of the 1994 accident and surgery, he has an additional 5% whole person impairment and now suffers from "failed back syndrome." It is the consensus of medical opinion that additional surgery would not alleviate Mr. C.'s continuing back problems.

Mr. C. was able to perform his work duties at Renco prior to the accident of September 1994. He has not returned to work at Renco, or elsewhere, since that accident. On October 2, 1996, the Social Security Administration found Mr. C. totally disabled as of September 8, 1994, the date of his accident at Renco.

Mr. C. continues to suffer from pain in his back and legs. He has difficulty with household chores and requires frequent rest periods and changes of position. He uses a cane. In addition to his work-related injuries, Mr. C. suffers from gout, high cholesterol, borderline diabetes and depression, as well as learning disabilities related to his dyslexia.

During early April, 1995, Mr. C. underwent an extensive, week-long evaluation by the Utah State Office of Rehabilitation. Mr. C. was noted to have vocational strengths in areas such as abstract reasoning, mechanical aptitude, organizational skills, and "persistence despite discomforts and learning disabilities." Vocational weaknesses were noted in his ability to read and write, math skills, fine movement coordination and dexterity, and work tolerance in light of continuing pain. The evaluator concluded that Mr. C.'s various disabilities limited him to sedentary or light duty work on a part-time basis. The evaluator further concluded that Mr. C.'s various problems made it unlikely that he could "make a liveable income from employment."

Renco subsequently employed Buck Hall, a certified vocational counselor with Crawford and Company Disability Management Company, to provide an additional assessment of Mr. C.'s employability. Mr. Hall submitted his report on January 23, 1998. Relying on opinions of a physician and physical therapist who had also examined Mr. C. on behalf of Renco, Mr. Hall concluded Mr. C. could work at a "light medium" level of exertion. Mr. Hall noted that Mr. C. had an excellent employment history prior to his work accident of September, 1994. Mr. Hall also noted many of the same vocational strengths that had been reported by the Utah State Office of Rehabilitation. However, Mr. Hall minimized the effects of Mr. C.'s work injury on his ability to return to work. Mr. Hall concluded that Mr. C. might be able to obtain medium-to-light duty employment as an assembly worker, bench welder, or welding and fabrication worker. Mr. Hall also recommended that Mr. C. undergo further assessment and diagnostic evaluation.

Judge Sims received the foregoing evidence in an evidentiary hearing held during February, 1998. On May 11, 1998, Judge Sims issued his decision concluding, among other things, that Mr. C. was entitled to a preliminary finding of permanent total disability, subject to Renco's statutory right to submit a reemployment plan reasonably designed to return Mr. C. to work, and request a hearing on such plan.

Thereafter, the parties engaged in what may fairly be described as a protracted, litigious and contradictory course of conduct relative to the preparation, submission and implementation of a reemployment/rehabilitation plan. Among the salient shortcomings of this process was Renco's failure to submit and obtain Commission approval of any comprehensive written plan defining the parties' respective rights, obligations and goals. The reemployment/rehabilitation process degenerated into an ad hoc effort involving a large number of different individuals, none of whom was aware of all important details and considerations.

To the extent any of the various "reemployment plans" contained objective requirements that were adequately communicated to Mr. C., he complied with such plans. None of the plans resulted in actual employment for Mr. C..

### **DISCUSSION AND CONCLUSIONS OF LAW**

\_\_\_\_\_Issues raised by Renco's motion for review can be grouped into two categories. The first category includes Renco's challenges to the underlying compensability of Mr. C.'s claim and his right to a preliminary determination of permanent total disability. The second category includes issues related to the interpretation and application of the §67's reemployment/rehabilitation provisions, including Renco's constitutional arguments. The Appeals Board addresses each category below.

\_\_\_\_\_Compensability of claim/ preliminary finding of permanent total disability. Utah's Workers' Compensation Act provides medical and wage replacement benefits to workers injured by accident arising out of and in the course of employment. Thus, before an applicant can receive any of the benefits provided by the Act, the applicant must prove that the injury: 1) occurred by accident; 2) arose out of employment; and 3) arose in the course of employment. Renco concedes Mr. C.'s injury was accidental and in the course of employment, but contests Judge Sims' conclusion that the

accident also “arose out of” employment.

In response to Renco’s argument, Mr. C. contends the Appeals Board cannot consider the foregoing issue because Renco did not file a timely motion for review of Judge Sims’ decision. However, Judge Sims’ decision failed to advise Renco of its right to file a motion for review. For that reason, Renco did not file a motion for review of Judge Sims’ order, but instead waited until Judge Eblen issued her final order in this matter on September 28, 2001. Renco then filed a comprehensive motion for review of both Judge Sims’ interim order and Judge Eblen’s final order.

Section 34A-2-801(3)(a) of the Act and §63-46b-12(1)(a) of the Utah Administrative Procedures Act (UAPA”) permit a party to obtain review of an ALJ’s decision by filing a motion for review within 30 days of the issuance of the decision. A timely motion for review is a prerequisite for the Appeals Board’s jurisdiction. Maverik Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993.) However, §63-46b-10(1)(a) of UAPA also requires that the ALJ’s decision must include “a notice of any right to administrative or judicial review of the order available to aggrieved parties(.” The Utah Court of Appeals has held that an agency’s failure to comply with the notice requirements of §63-46b-10(1)(a) is presumed to substantially prejudice the rights of the party entitled to such notice so as to require remedial action by the agency. Krantz v. Utah Dept. of Commerce, 856 P.2d 369, 371 (Utah App. 1993).

Because Renco was not given notice of its right to request agency review of Judge Sims’ decision, and in light of §63-46b-10(1)(a)’s requirement for such notice, the Appeals Board concludes that the 30 day period to request agency review was tolled from the date of Judge Sims’ decision until September 28, 2001, when Judge Eblen issued her final order and advised Renco of its appeal rights. Consequently, Renco’s motion for review filed October 26, 2001, is timely. The Appeals Board will proceed to consider the merits of Renco’s arguments.

The Appeals Board now turns to the question of whether Mr. C.’s injury arose out of his employment at Renco. In Allen v. Industrial Commission, 729 P.2d 15, 25 (Utah 1986), the Utah Supreme Court adopted Professor Larson’s proposal that the “arising out of” requirement be subdivided into two components--“legal causation” and “medical causation.” The Allen Court explained this analytical framework as follows:

(Professor) Larson suggests that compensable injuries can best be identified by first considering the legal cause of the injury and then its medical cause. (Citation omitted.) “Under the legal test, the law must define what kind of exertion satisfies the test of ‘arising out of the employment’ . . . (then) the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this (injury).” (Citing Larson).

In Price River Coal Co. v. Industrial Commission, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

Under Allen, an usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant

suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." . . . . The requirement of "unusual or extraordinary exertion" is designed to screen out those injuries that result from a personal condition which the worker brings to the job, rather than from exertions required of the employee in the workplace. (Citations omitted.)

At the time of his accident of September 8, 1994, Mr. C. suffered from pre-existing facet joint hypertrophy and spinal stenosis that was unrelated to his work. These preexisting conditions combined with the work-related disc herniations to necessitate his surgery. Because Mr. C. suffered from preexisting conditions that contributed to the injuries for which he now seeks benefits, he must satisfy the more stringent prong of the Allen test for legal causation by establishing that his workplace exertion was unusual or extraordinary when compared to typical exertions of modern nonemployment life.

In order to determine whether Mr. C.'s workplace exertion satisfies the more stringent prong of the Allen test for legal causation, the Appeal Board must first determine which of Mr. C.'s exertions at work on September 8, 1994, are relevant. On September 8, 1994, Mr. C. lifted, carried and cut 60 bricks in a three hour period. Renco contends the Appeals Board should judge whether Mr. C.'s exertion was unusual or extraordinary by focusing only on the exertion involved in lifting the final brick, and disregard his earlier, more substantial exertions.

The Appeals Board has carefully reviewed the record on this point and concludes that Mr. C.'s injury was the climax of his exertions throughout the morning, rather than the result of lifting a single brick. Consequently, all of Mr. C.'s exertions on the day of his accident must be considered. In that context, the Appeals Board concludes that Mr. C.'s exertion in lifting, carrying and cutting 60 bricks, each weighing 35 pounds, was unusual and extraordinary when compared to typical modern nonemployment exertions. The Appeals Board therefore concludes that Mr. C. has satisfied the test for legal causation and that his injury arose out of employment at Renco. As such, it is compensable under Utah's workers' compensation system.

The next issue before the Appeals Board is whether Mr. C. has established his right to a preliminary determination of permanent total disability compensation. Mr. C.'s claim must be evaluated according to the law in effect on September 8, 1994, the date of his accident. At that time, §35-1-67(1) of the Act provided as follows:

(b) Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised.

(c) The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520(b), (c), (e) and (f)(1) and (2), as revised.

Pursuant to the foregoing directive, the Commission adopted Rule R612-1-10.B, Utah

Administrative Code. Among other provisions, Rule R612-1-10.B.1. authorizes use of the Social Security Administration's determination of disability under Title 20 C.F.R. in lieu of repeating the disability determination process for workers' compensation purposes. The rule also sets out the particular elements established by Title 20 C.F.R. for evaluating permanent total disability. Among these elements are the requirements that the claimant's industrial accident is a significant cause of the disability and that the disability prevents the claimant from doing other work.

The Social Security Administration has already determined that Mr. C. meets the standards for permanent disability established by Title 20 CFR. As permitted by the Commission's Rule R612-1-10.B.1, the Appeals Board finds that Mr. C. has therefore established his right to a preliminary finding of permanent total disability for workers' compensation purposes. However, the Appeals Board will also consider Renco's specific arguments regarding the cause of Mr. C.'s disability and his ability to do other work.

Renco contends the findings of fact contained in Judge Sims' decision of May 11, 1998, were inadequate to support his determination that Mr. C.'s was entitled to a preliminary finding of permanent total disability. Whether or not Judge Sims' findings were inadequate, the Appeals Board has set forth its own findings on the subject. Those findings conclude that the vocational report prepared by the State Office of Rehabilitation, together with Mr. C.'s own testimony, are persuasive regarding the effect of Mr. C.'s work-related injuries on his ability to work.

Renco also argues that Mr. C.'s work accident of September, 1994, is not a significant cause of his disability and that his claim for disability benefits should be attributed to the first accident he suffered at Renco, during 1989. However, the medical evidence establishes that Mr. C. incurred a 5% whole person impairment from the second (1994) accident. Such an impairment is substantial in its own right. Furthermore, up to the time of the 1994 accident, Mr. C. was able to perform his job at Renco; afterwards he could not. The Appeals Board concludes that Mr. C.'s work accident of September 1994 was a significant cause of his disability and properly serves as the basis for his current claim of permanent total disability.

In summary, the Appeals Board concludes that the injuries for which Mr. C. seeks workers' compensation benefits are compensable under the Act. The Appeals Board further concludes Mr. C. cannot perform other work and that his injuries from the 1994 accident are a significant cause of his disability. The Appeals Board therefore affirms Judge Sims' preliminary finding that Mr. C. is permanently and totally disabled, subject to Renco's right to propose a reemployment/rehabilitation plan.

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Interpretation, application and constitutionality of reemployment/rehabilitation provisions. Renco contends §35-1-67 of the Act does not require it to submit its reemployment plan for Mr. C. to the Labor Commission for approval. This argument has been considered and rejected by the Utah Court of Appeals in Color Country Management v. Labor Commission, Utah Court of Appeals Case No. 200001019, filed December 6, 2001. The Appeals Board therefore concludes that Renco was required to submit its reemployment plan to the ALJ for approval before implementing the plan.

Next, Renco contends that Judge Switzer and Judge Eblen approved Renco's reemployment

plans for Mr. C.. The record is confused on this issue. But having reviewed the record, it appears that much of the confusion was caused by Renco's erroneous belief that it was free to devise

and substitute reemployment plans at will. As a result, the only plans that were approved by the ALJs were vague proposals for "direct placement" with no clear definition of the parties' respective roles or expectations. Instead of the confused and inadequate procedures used in this case, Renco should have followed the steps outlined by §35-1-67 for implementation of a reemployment plan. Those steps are: 1) Notice to the ALJ and injured worker of intent to develop a reemployment plan; 2) Development of the plan; 3) Presentation of the plan to the ALJ, either by hearing or stipulation of the parties; and 4) Approval and implementation of the plan.

Even if the Appeals Board were to conclude that Renco's "direct placement" plan was properly authorized and implemented, the Appeals Board concludes that such plan has been unsuccessful in rehabilitating or reemploying Mr. C.. Mr. C. has complied with the objective requirements of such plan. As to the subjective aspects of such a plan, the Appeals Board is not convinced that Mr. C.'s attitudes amounted to a failure to cooperate with the plan, particularly in view of the plan's lack of definition and the frequent changes of personnel involved in implementing the plan.

As to Renco's constitutional challenges to §35-1-67, the Utah Court of Appeals has considered and rejected those arguments in Color Country Management v. Labor Commission, Id.

Summary. The Appeals Board concludes that Mr. C. suffered a compensable work-related accident while employed by Renco on September 8, 1994. As a result of his injuries from such accident, together with other work and non-work conditions, Mr. C. was permanently and totally disabled. Renco has failed to implement a successful plan to rehabilitate or reemploy Mr. C.. Mr. C. has satisfied his obligation to cooperate with Renco's reemployment/rehabilitation efforts. Mr. C. is, therefore, entitled to a final determination of permanent total disability and a final award of permanent total disability compensation.

### **ORDER**

For the reasons stated herein, the Appeals Board affirms Judge Sims' determination of May 11, 1998, that Mr. C. was entitled to a preliminary determination of permanent total disability under the Act. Also for the reasons stated herein, the Appeals Board affirms Judge Eblen's conclusion of September 28, 2001, that Mr. C. is now entitled to a final award of permanent

total disability compensation. Renco shall immediately pay to Mr. C. all compensation, interest thereon, and other benefits as previously ordered in decisions of Judge Sims and Judge Eblen. It is so ordered.

Dated this 21<sup>st</sup> day of May, 2001.

Colleen S. Colton, Chair  
L. Zane Gill  
Patricia S. Drawe

1. The Act was recodified on July 1, 1997, as Title 34A, Chapter 2. Because Mr. C.'s claim is subject to the substantive provisions of the Act in effect at the time of his accident, this decision refers to the 1994 version of the Act. Procedural matters are controlled by the current version of the Act.